U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

B5

DATE: JUN 23 2011 OFFICE: NEBRASKA SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as director of research and development at [redacted]. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also note\s that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on February 23, 2009. In a statement accompanying the initial submission, counsel described IS as

> an industrial engineering firm that specializes in developing sophisticated operations research models for large-scale problems in the transportation and logistics industry. [The petitioner] directs leading research on transportation scheduling problems, with applications in the railroad, airline and trucking industries. [The petitioner's] work in

> the field of industrial and systems engineering is internationally recognized for its contributions to the efficiency and productivity of U.S. transportation systems. . . .
>
> [The petitioner] is an internationally known expert in the field of industrial and systems engineering and is considered by leading figures to be among the few in the field who have risen to the very top of his field of endeavor.

An alien need not be "an internationally known expert . . . [at] the very top of his field" to qualify for the national interest waiver. Counsel has chosen nevertheless to make that claim about the petitioner, at the risk of his credibility. A reputation of that magnitude will leave concrete evidence in its wake, and failure to provide such evidence is not conducive to a finding in the petitioner's favor.

The petitioner submitted documentation of his participation at various conferences and programs, as well as copies of two published articles and the manuscript of a conference presentation. The petitioner prepared all the papers in 2003-2004, while he was a doctoral student at the University of Florida (UF). The papers all feature UF faculty members as co-authors. One of the two published papers appeared in *Naval Research Logistics* in 2005, the other in *INFORMS Journal on Computing* in 2007.

The petitioner submitted three citation lists, two pertaining to his 2005 article and the third relating to his 2007 article. The lists, at first glance, appear to show 11 citations, but there are redundant listings. One article appears on two of the lists. Another article appears a total of four times, twice each on two lists with the order of authors rearranged. Therefore, the lists show only seven different articles. Five of those seven articles (including the repeated listings) are by the petitioner and/or his co-authors, citing their own work. This leaves two documented, independent citations of the petitioner's published work. The publication history, therefore, does not establish the petitioner's impact or influence in his field. The petitioner must turn to other means to do so.

Ten witness letters accompanied the petitioner's initial filing. Most of the witness letters date from between September and November 2007. The letters are originals, rather than photocopies of letters submitted in support of any prior petition. The record does not explain the delay of over a year between the execution of the letters and the filing of the petition.

All ten witnesses have some kind of demonstrable ties to the petitioner. [redacted] the president and chief executive officer of IS, as well as a professor at UF. [redacted]

> Through my extensive consulting activities with airlines and railroads, I realized that there was a need for optimization-based decision support systems for large transportation companies unmet by current consulting companies. To address this need, I founded the company *Innovative Scheduling, Inc.* The company specializes in developing customized as well as off-the-shelf decision support systems for very

large-scale and complex optimization problems arising in the logistics and transportation field. . . .

I have known [the petitioner] very well since 2000, when he was admitted into the Ph.D. program in the Industrial and Systems Engineering Department at the University of Florida, and I was a member of his supervisory committee. [The petitioner] distinguished himself from his peer fellows by his superior research skills, innovative ideas, and productivity. During his graduate research, [the petitioner] focused on the research and development of optimization models to solve very complex and difficult supply-chain problems, including the multi-period single-source problem, the continuous-time single-source problem, and the multi-period flexible demand assignment problem. These problems are among the most important problems arising in real-life supply-chain application. The solutions to these problems are essential to improving the efficiency of the domestic and international distribution network, a vital factor in the growth of the US economy in the current world of globalization. However, these problems are extremely difficult to solve because of their large scale and their intensely mathematical nature. [The petitioner] has . . . contributed significantly to the research needed to solve these problems. . . .

During his first year of graduate study, [the petitioner] worked on a real-life project for UPS to develop a model to solve its vehicle routing problem. [The petitioner] not only developed an efficient heuristic to solve this difficult problem, but he also created a very user-friendly graphic interface to display the route of the vehicle. . . .

Through the application of his innovations at Innovative Scheduling, [the petitioner] is making significant contributions to railroads worldwide and to the US economy. [The petitioner] played a key role in the development of two of our major products: *Innovative Railroad Blocking Decision Support System* (IRB-DSS) and *Innovative Train Scheduling Decision Support System* (ITS-DSS). . . . In the past, the processes of overhauling the operations plan for a major US railroad were completely manual. They usually took more than six months to finish and only resulted in minor improvements. Using the products, in which [the petitioner] is taking a lead role in development, major US railroads can now create far optimized and better operating plans within a week. This results in a savings of at least $30 million in annual operations costs for each major U.S. railroad. This software has already been licensed by BNSF Railway (second largest railroad in US) and is very likely to be licensed by Union Pacific (the largest railroad in US). [The petitioner] has also played a leading role in the development of the Network Optimizer software, which has been used by CSX to explore the possibilities of relocating its yards and expanding its capacities. Currently, [the petitioner] is leading the Network Planning Project for Pacer Stacktrain, a major intermodal transportation service provider in North America.

[redacted] who served on the petitioner's supervisory committee and reviewed his doctoral dissertation, stated:

> [The petitioner] applied an innovative technique called *Very-Large Scale Neighborhood* (VLSN) Search to develop[] highly efficient heuristics to produce near-optimal solutions for [complex and difficult logistical problems]. . . . [The petitioner] implemented these algorithms very efficiently to enumerate and evaluate trillions of neighbors in fractions of a second. Thus the algorithms can be used to solve large-sized problems that no other researchers have solved.

UF Professor [redacted] the beneficiary's doctoral advisor, covered much of the same ground as the witnesses previously quoted, and stated that the petitioner "led the development of several of [IS's] flagship products."

[redacted] an associate professor at UF, "served as a member of [the petitioner's] supervisory committee and had the opportunity to closely examine [the petitioner's] outstanding research work." [redacted] stated that the petitioner's "talent is indispensable for the growth of [redacted] and, therefore, U.S. transportation sectors."

[redacted] associate professor at the University of São Paulo, Brazil and a senior consultant for [redacted] "witnessed [the petitioner's] pioneering and innovative research work" "during my visit to the University of Florida, Gainesville, between August 2003 and April 2004." [redacted] numbered the petitioner among [redacted] "key personnel in converting proven academic models for solving railroad operations planning problems to commercial-grade software applications."

[redacted] now an assistant professor at Binghamton University, studied alongside the petitioner at Tsinghua University in Beijing, China. [redacted] discussed projects at various stages of the petitioner's career, and stated:

> Recently, [the petitioner] has [led] a project to build a *Global Network Planning and Flow Writing System (GNPFS) for United Parcel Service* (UPS) to perform a variety of what-if analys[e]s and identify opportunities for cost cutting and service improvements. Fortunately I have partially participated in this project and have the opportunity to work closely with [the petitioner]. . . . [T]he current UPS system takes days to validate a plan and there is no system [that] can validate minor plan changes in real time. The goal of this project is to build a system that can validate a plan in less than one hour and validate minor plan changes in seconds. . . . Largely due to [the petitioner's] outstanding work, the project finished successfully and a prototype system is built. UPS has tested the prototype and is very pleased. It has decided to go to [the] next phase to build a real time system as its global operating planning system. . . . Such a system will no doubt benefit not only the shipping industry and its customer by reducing cost but also the whole economy and environment with much improved efficiency.

[redacted], deemed the petitioner "one of the few individuals particularly talented to develop such optimization-based, web-enabled software applications, from which the U.S. railroad industry will benefit greatly."

[redacted], stated:

> I came to know [the petitioner] in 2004 when he participated in a yard location configuration and capacity extension study to determine at the strategic level how [redacted] should invest its capital and resources in the growth of the U.S. transportation market. . . . [The petitioner] rapidly developed a geographic information system (GIS)-enabled decision support tool. This tool played a key role in the study. It provided a very user-friendly interface for the analysis and visualized the network configuration changes.

[redacted], assistant vice president of equipment at Pacer Stacktrain and a former director of operations research at [redacted], stated:

> [The petitioner] is currently leading [redacted] . . .
>
> I believe that NPM will play a key role in improving the efficiency of the operations of [redacted], an important component of the national intermodal transportation system, with better equipment utilization, improved velocity, reduced transportation costs, and increased revenues in potential millions of dollars. . . .
>
> [The petitioner] is a researcher of immense creativity and skill. He has demonstrated highly developed mathematical and computational abilities crucial to succeeding in the challenging area of developing technologies to solve real-life transportation problems. He has made real and significant contributions to the productivity of U.S. transportation systems, contributions that are substantially greater than those of others with similar backgrounds and qualifications.

[redacted], a former senior vice president of finance and corporate development at [redacted], and a member of [redacted] board of directors, claimed no expertise in the petitioner's specialty but stated: "I understand the complexity of such real-life problems, and the special skills they take to solve. I know the rail industry benefited immensely from [the petitioner's] modeling efforts, which . . . make our transportation system more productive, safer, environmentally cleaner and more fuel efficient."

On December 21, 2009, the director instructed the petitioner to "submit documentary evidence to establish . . . a past record of specific prior achievement that justifies projections of future benefit to

the national interest." The director also requested additional documentation of the citation history of the petitioner's published work. The director stated: "The evidence submitted with the petition has already been considered; therefore, please DO NOT re-submit the same evidence." Nevertheless, the petitioner resubmitted copies of the initial witness letters, with some passages highlighted in yellow ink for emphasis.

In terms of new evidence, the petitioner submitted photocopies of nine papers that contained citations to the petitioner's work. Setting aside self-citations by the petitioner's coauthors, this submission included three independent articles, including the two documented in the previous submission. Therefore, the petitioner's initial submission did not establish a pattern of widespread independent citation of the petitioner's work, and his second submission did not show significant growth in that pattern.

The director denied the petition on February 17, 2010, acknowledging the intrinsic merit and national scope of the petitioner's occupation, but finding that the petitioner had not demonstrated his influence on the field. The director asserted that the petitioner's citation record is minimal, and that the witness letters "did not distinguish beneficiary from other Researchers in his field." The director quoted from several of the witness letters and, while acknowledging their sincerity, concluded that the "objective evidence of record simply does not support the witnesses' claim or show that the opinions of those witnesses represent any sort of consensus in the petitioner's specialty."

On appeal, counsel claims that the director emphasized the beneficiary's citation history, and "failed to address the other substantial evidence documenting that self-petitioner has indeed made several highly significant contributions to his field, regardless of the number [of] articles that cite his work." Counsel accuses the director of "overemphasizing one factor, the number of citations to petitioner's published research, to the exclusion of the other substantial documentation submitted", and of "inappropriately giving little significance to the several letters of recommendation by experts in petitioner's field and by failing to consider the content of those letters."

It is true that citations are not always the best gauge of an alien's impact in his field. In this instance, the petitioner did not claim to have begun any published work after 2004, or to be at work on future publications. The petitioner's current role at IS appears to focus on creating proprietary products for his employer, rather than conducting research intended for publication. Under these circumstances, it would not be proper to expect the petitioner to be actively producing high-impact articles.

Nevertheless, the record does not support counsel's charge that the director "overemphasiz[ed]" citations. The body of the denial notice occupies four pages, of which the director devoted only two paragraphs to the citation issue. In contrast, the director's discussion of the witness letters took up a full page, including quotations from several of the letters.

The opinions of experts in the field are not without weight and the AAO has considered them above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is

ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as the AAO has done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

In this instance, the letters contain relatively specific claims about the nature of the petitioner's contributions to his field. The letters include claims of specific, objective fact, such as assertions regarding cost savings resulting from the petitioner's work. The petitioner did not submit any documentary evidence to support these claims. When the director asked for more documentation, and specifically instructed the petitioner not to merely re-submit prior submissions, the petitioner re-submitted prior submissions with little new supporting evidence.

If the petitioner's work has resulted in major increases in efficiency, then verifiable documentation should exist to support that claim. If, on the other hand, the petitioner's work has not yet yielded such results, then claims that it will eventually have that effect amount to speculation.

It may well be that the petitioner's work has and will continue to have the effects claimed in the witness letters. Neither the director nor the AAO has made any finding that the witnesses are not credible or that their statements are false. Nevertheless, the director acted properly in finding that the petitioner has not submitted objective evidence to support the witnesses' claims. The AAO will affirm the director's finding to that effect.

The AAO notes that, earlier this year, IS filed an I-140 petition, with an approved alien employment certification, seeking to classify the beneficiary under the same classification he sought for himself in the present proceeding. USCIS approved that petition on April 27, 2011. Given this new development, the present proceeding involves, in effect, a request for an exemption from a requirement that the petitioner has already met.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.